Public Bank Bhd v Low Kok Tin & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2–22–907 OF 1992
MOKHTAR SIDIN JCA
30 MARCH 2001

Land Law *— Tenancy — Termination of — Notice to terminate, whether valid — Variation of agreement at negotiation stage by formal contract entered into subsequently by parties — Delay in delivering vacant possession — Reinstatement works defective — Whether landlord entitled to compensation*

Some time in May 1985, the plaintiff approached the defendant's representative to negotiate a lease of premises in Wisma SCA ('the premises'). It was not disputed that both parties negotiate for a long term lease to which they came to a mutual understanding that the lease should be at least 12 years. It was also understood between the parties that the 12 years should be divided in four three-year terms whereby the parties agreed that for each three-year term the parties had to execute separate tenancy agreement. Each agreement had separate rental rate with an option for the plaintiff to renew the tenancy agreement for another three year term at the rate as specified in the tenancy agreement. The plaintiff took possession of the premises on 14 October 1985 and did major renovation works. One of the terms and conditions of the tenancy agreement was that upon the expiration of the lease, the premises would be reinstated by the plaintiff to its original state. Before the expiry of the second tenancy agreement, the plaintiff wrote to the defendant informing them that the plaintiff would not renew the tenancy. The plaintiff also informed the defendant that they would carry out the reinstatement works and would hand over vacant possession of the premises on 1 November 1991. The defendant refused to accept vacant possession on that date on the ground that the reinstatement works to the premises had yet to be completed. The keys to the premises were left at the premises by the plaintiff's contractor on 13 January 1992 even though the defendant had informed the plaintiff that the reinstatement works had not been completed and were defective. The plaintiff brought an action against the defendant claiming for the refund of the deposit. It was submitted that the plaintiff was within their right to terminate the tenancy as stipulated in the contract. The defendant submitted that the termination notice was unlawful, invalid and of no effect because it went against what had been agreed upon by the parties during the negotiations and the letters of offer and acceptance. The defendant counterclaimed for: (i) rental for the period 14 October 1991 to 13 January 1992; (ii) cost of reinstatement; and (iii) loss of rental being the difference between the rental payable by the plaintiff and the rentals obtained by the defendant in respect of the premises for the remaining period of six years.

Held:

(1) By the action of both parties in agreeing to enter into a formal tenancy for each three-year term, the parties had agreed to vary whatever had been agreed during the negotiations. The parties were bound by the terms and conditions of the second tenancy agreement which the parties had executed. The negotiations and the letters of offer and acceptance were subject to the execution of a formal tenancy agreement as agreed by the parties. After viewing the evidence as a whole, the court found that the plaintiff was within their right under the terms of the second tenancy agreement not to renew the tenancy. The notice given by the plaintiff not to extend the tenancy was therefore lawful and valid. Thus the defendant were not entitled to the claim for loss of rentals for the remaining six years (see pp 357G–H, 358I, 359A, E).

(2) The failure on the part of the plaintiff to deliver vacant possession on 1 November 1991 would render the plaintiff liable to pay rent for the period from the date when the second tenancy expired to the date of actual delivery of vacant possession. Although formal delivery of vacant possession was not done, it was obvious that the premises was handed back to the defendant on 13 January 1992. Thus the defendant were entitled to the rental in respect of the premises from 14 October 1991 to 13 January 1992 (see pp 360D–E, H, 361A).

(3) From the evidence, the plaintiff did nothing to dispute the defendant's claim that the reinstatement works done by the plaintiff were uncompleted and defective. Further the defendant had produced photographs to show that the materials used by the plaintiff were not similar to the original materials. The court allowed the defendant's claim for remedial works (see p 362D, G, I).

(4) It was reasonable to give the defendant one month period to complete the remedial works commencing from 13 January 1992. The defendant should be compensated for the loss of rental of one month from 13 January 1992 (see p 363B–C).

[Bahasa Malaysia summary

Sekitar bulan Mei 1985, plaintif menemui wakil defendan untuk berundingkan satu pajakan premis-premis di Wisma SCA ('premis tersebut'). Adalah tidak dipertikaikan bahawa kedua-dua pihak telah berunding untuk satu pajakan jangka panjang di mana mereka saling memahami bahawa pajakan tersebut hendaklah lebih kurang 12 tahun. Adalah juga difahami antara kedua-dua pihak bahawa 12 tahun tersebut hendaklah dibahagikan kepada empat tempoh tiga tahun di mana pihak-pihak bersetuju agar setiap tempoh tiga tahun tersebut disempurnakan dalam perjanjian penyewaaan berasingan. Setiap perjanjian mempunyai kadar sewa yang berasingan dengan pilihan untuk plaintif memperbaharui perjanjian penyewaan tersebut

untuk tempoh tiga tahun lagi pada kadar yang ditentukan di dalam perjanjian penyewaan tersebut. Plaintif telah mengambil milikan atas premis tersebut pada 14 Oktober 1985 dan membuat kerja pengubahsuaian besar. Salah satu terma dan syarat perjanjian penyewaan adalah dengan tamatnya pajakan tersebut, premis tersebut akan dikembalikan oleh plaintif kepada keadaan asalnya. Sebelum tamatnya perjanjian penyewaan kedua, plaintif telah menulis kepada defendan memaklumkan mereka bahawa plaintif tidak akan memperbaharui penyewaan tersebut. Plaintif juga memaklumkan defendan bahawa mereka akan menjalankan kerja-kerja pengembalian dan akan menyerahkan milikan kosong premis tersebut pada 1 November 1991. Defendan enggan untuk menerima milikan kosong tersebut pada tarikh itu atas alasan bahawa kerja-kerja pengembalian ke atas premis tersebut belum lagi selesai. Kunci-kunci kepada premis tersebut ditinggalkan di premis tersebut oleh kontraktor plaintif pada 13 Januari 1992 walaupun defendan-defendan telah memaklumkan plaintif bahawa kerja-kerja pengembalian tersebut belum lagi diselesaikan dan adalah cacat. Plaintif telah memulakan satu tindakan terhadap defendan menuntut pulangan wang deposit. Adalah dihujahkan bahawa plaintif berhak untuk menamatkan penyewaan tersebut sebagaimana yang dinyatakan di dalam kontrak tersebut. Defendan berhujah bahawa notis penamatan tersebut adalah tidak sah di sisi undang-undang, tidak sah dan tidak berkesan kerana ia bertentangan dengan apa yang dipersetujui oleh kedua-dua pihak semasa perundingan-perundingan dan dalam surat-surat tawaran dan penerimaan. Defendan menuntut balas untuk: (i) sewa untuk tempoh 14 Oktober 1991 hingga 13 Januari 1992; (ii) kos pengembalian tersebut; dan (ii) kehilangan sewa di mana perbezaannya diperoleh oleh defendan berhubung premis tersebut untuk tempoh enam tahun berikutnya.

Diputuskan:

(1) Melalui tindakan kedua-dua pihak dalam mempersetujui untuk memasuki satu penyewaan untuk tempoh tiga tahun masing-masing, pihak-pihak tersebut telah bersetuju untuk mengubah apa yang telah dipersetujui semasa perundingan. Kedua-dua pihak terikat dengan terma-terma dan syarat-syarat perjanjian penyewaan kedua yang telah disempurnakan oleh kedua-dua pihak. Perundingan-perundingan dan surat-surat tawaran dan penerimaan tersebut tertakluk kepada penyempurnaan satu perjanjian penyewaan rasmi sebagaimana yang dipersetujui oleh kedua-dua pihak. Setelah mengkaji keterangan tersebut dengan menyeluruh, mahkamah mendapati bahawa plaintif berhak di bawah terma-terma perjanjian penyewaan kedua tersebut untuk tidak memperbaharui penyewaan tersebut. Notis yang diberikan oleh plaintif untuk tidak melanjutkan penyewaan tersebut oleh demikian adalah sah. Oleh itu defendan tidak berhak untuk

menuntut kehilangan sewa untuk enam tahun yang tinggal lagi (lihat ms 357G–H, 358I, 359A, E).

(2) Kegagalan di pihak plaintif untuk menyerahkan milikan kosong pada 1 November 1991 akan menyebabkan plaintif bertanggungjawab untuk membayar sewa untuk tempoh daripada tarikh apabila perjanjian penyewaan kedua tamat hingga tarikh penghantaran sebenar milikan kosong. Walaupun penghantaran rasmi milikan kosong tidak dilakukan, ia adalah nyata bahawa premis tersebut dikembalikan kepada defendan pada 13 Januari 1992. Oleh itu defendan berhak terhapda sewa tersebut berhubung dengan premis tersebut daripada 14 Oktober 1991 hingga 13 Januari 1992 (lihat ms 360D–E, H, 361A).

(3) Daripada keterangan, plaintif tidak melakukan apa-apa untuk mempertikaikan tuntutan defendan bahawa kerja-kerja pengembalian tersebut yang dilakukan oleh palintif tidak selesai dan cacat. Tambahan pula defendan telah mengemukakan gambar-gambar foto untuk menunjukkan bahawa bahan-bahan yang digunakan oleh plaintif tidak sama dengan bahan-bahan asal. Mahkamah membenarkan tuntutan defendan untuk kerja-kerja pemulihan (lihat ms 362D, G, I).

(4) Adalah munasabah untuk memberikan defendan tempoh satu bulan untuk menyelesaikan kerja-kerja pemulihan bermula daripada 13 Januari 1992. Defendan sepatutnya diberikan pampasan untuk kehilangan sewa untuk satu bulan daripada 13 Januari 1992 (lihat ms 363B–C).]

Notes

For cases on tenancy generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3339–3349.

Azman bin Othman Luk (*Chooi & Co*) for the plaintiff.
Fiona M Bodipalar (*Sri Ram & Co*) for the defendants.

Mokhtar Sidin JCA:. Sometime in May 1985, the plaintiff approached the defendants' representative, Sin Chuan Aik Brothers Realty Sdn Bhd, to negotiate a lease of premises in Wisma SCA ('the said premises'). On 6 May 1985, a meeting was held and it was attended by the plaintiff's representatives and the defendants' representatives. The plaintiff was represented by Ms Agnes Cheok and Mr Winston Lee while Mr KL Lau, Mr Sunny Low and Mr Ronnie Francis represented the defendants. At this meeting the plaintiff's representatives represented to the defendants that the plaintiff required a long term lease as the plaintiff was opening a new branch in the area where the said premises was situated and it would take the plaintiff at least six years to recover the cost of renovation works.

Pursuant to that meeting, copies of other tenancy agreements and letters of offer in respect of the said premises from other prospective tenants were forwarded to the plaintiff to enable the plaintiff to decide on the terms

and duration of the lease. Amongst the letters forwarded was a letter dated 12 December 1983 from United Asian Bank Berhad proposing to lease the said premises at the rental rate of RM4 per sq ft. A copy of a valuation report from Messrs Jones Lang & Wootton in respect of the said premises was also forwarded to the plaintiff. According to that report the market rate of the said premises was between RM5 to RM6 per sq ft. The plaintiff was told that the defendants were willing to let the said premises to the plaintiff at a lower rental rate than the one offered by the United Asian Bank on condition that the plaintiff was willing to lease the said premises on a long term basis with a deposit of six months rental and also advance payment of rental of one year. The tenancy agreement of UMBC was also revealed to the plaintiff where it was shown that the rental was at the rate of RM4 per sq ft.

The plaintiff indicated to the defendants that the plaintiff required a long term lease of about 15 years and the reason for doing so was to avoid increased rental rates.

It was contended by the defendants that on the advice of the plaintiff's representatives, the defendants agreed to enter into a tenancy agreement for three years at a fixed rental rate with an option to renew the tenancy for every subsequent three years at a fixed rental rate for 12 years. As agreed by the parties the rates proposed were as follows:

(a) for the first term of three years commencing from 14 October 1985 the rental was fixed at RM4 per sq ft;

(b) for the second term of three years commencing from 14 October 1988 the rental was fixed at RM5 per sq ft;

(c) for the third term of three years commencing from 14 October 1991 the rental was fixed at RM6.25 per sq ft; and

(d) for the fourth term of three years commencing from 14 October 1994 the rental was to be fixed at the prevailing market to be determined by independent chartered valuers.

According to the defendants, on the advice of the plaintiff, the lease was broken up into four terms instead of a straight 12 years lease. The first tenancy agreement for the period stated in (a) was prepared by Messrs Shook Lin & Bok and was duly executed on 7 July 1986.

When the plaintiff took up possession of the said premises on 14 October 1985, the plaintiff did major renovation works to the said premises in order to facilitate its banking business. The parties conducted a joint site inspection on 4 November 1985 whereby they signed a handover checklist to show the condition of the premises with all the existing fittings at the time when the plaintiff took possession of the said premises. One of the terms and conditions stipulated in the tenancy was that upon the expiration of the lease, the said premises would be reinstated by the plaintiff to its original state or as near as possible to its original state.

Before the first tenancy agreement was due to expire, the plaintiff wrote to the defendants requesting for a reduction of the rental for the second

three-year period which was already fixed at RM5 per sq ft and which was to commence on 14 October 1988. The defendants refused the request citing that it was on the request of the plaintiff that the rental was fixed at the rate stated above. Despite the defendants' refusal to reduce the rental rate, the plaintiff executed the second tenancy agreement on 17 November 1989 for the second three-year period commencing from 14 October 1988. The terms and the conditions of the second tenancy agreement were exactly the same as the first tenancy agreement except the rental rate. Even though the second tenancy agreement was executed, the plaintiff again requested for the reduction of the rental rate. This request was again refused by the defendants. On 7 June 1991, before the expiry of the second tenancy agreement, the plaintiff wrote to the defendants informing the defendants that the plaintiff would not renew the tenancy. On 27 June 1991, the defendants' solicitors replied stating that the plaintiff was in breach of the representations made to the defendants and that the notice to terminate dated 7 June 1991 was invalid, unlawful and of no effect. On 10 July 1991 the plaintiff replied stating that the notice given was in accordance with cl 5.01(s) of the second tenancy agreement. On 29 August 1991, the defendants' solicitors wrote back by way of without prejudice letter reiterating their stand in respect of the termination, but at the same time requested for a joint inspection of the said premises to facilitate the reinstatement of the same to its original state. The reason given was to mitigate the defendants' losses.

On 17 September 1991, the representatives of both parties carried out a joint inspection of the said premises and on 18 September 1991 the defendants' solicitors wrote to the plaintiff's solicitors identifying the items to be reinstated. The defendants also gave an estimate of RM79,910 to be the costs of reinstatement if the defendants undertook to do the reinstatement works. The plaintiff, by a letter dated 25 September 1991 rejected the defendants' estimate and intimated that the plaintiff would carry out the reinstatement works. By the same letter the defendants were informed that the plaintiff would be able to hand over vacant possession of the said premises on 1 November 1991. The defendants refused to accept vacant possession on that date on the ground that the reinstatement works had not been completed. On 13 January 1992 the defendants' representatives went to inspect the said premises and found that the reinstatement works to the said premises had yet to be completed. The defendants gave evidence that when their representatives were at the site, the plaintiff's representatives were also there but refused to participate in the joint inspection. The defendants refused to accept vacant possession on the ground that reinstatement works had not been completed. On the instruction of the plaintiff's representatives, the plaintiff's contractor left the keys at the said premises. On the same day the defendants wrote to the plaintiff informing the plaintiff of the various defects found at the said premises and also requesting the plaintiff to remedy the defects.

The solicitors for the plaintiff wrote back on 14 January 1992 stating that at the time of handing over of the said premises to the defendants the said premises was in good condition. By the same letter the plaintiff

demanded the refund of the deposit of RM251,700 (this figure was not disputed). The defendants refused to refund the deposit. Meanwhile, the defendants advertised for new tenants in respect of the said premises. In August 1995 part of the said premises was leased to UMW Toyota Motors Sdn Bhd and in September 1995 the other part of the said premises was leased to Allied Bank Bhd.

On the defendants' refusal to refund the deposit the plaintiff took up the present action. The plaintiff also claimed interest on the said sum from the date of the demand. The defendants in their statement of defence took up the stand that the termination notice dated 1 November 1991 was unlawful and invalid. The termination by the plaintiff was premature. As a result of that the defendants had suffered losses from the expected rental income for the remaining period. The defendants in their defence also claimed that the plaintiff failed to deliver vacant possession of the said premises on 1 November 1991. The keys to the said premises were left at the said premises by the plaintiff's contractor on 13 January 1992 even though the defendants had informed the plaintiff that reinstatement works had not been completed and were defective. As a result the defendants counterclaimed for the following;

(a)	Rental for the period 14 October 1991 to 13 January 1992 at RM157,312.50 per quarter payable in advance	RM157,312.50
(b)	Costs of reinstatement	RM58,500.00
(c)	Loss of rental being the difference between the rental payable by the plaintiff and the rentals obtained by the defendants in respect of the demised premises for the remaining period of six years	(not ascertainable)

In addition, the defendants also claimed for general damages for the unlawful termination of the tenancy. It appears to me that this claim is an alternative to the loss of rental claim under item (c).

In their reply the plaintiff claimed that the plaintiff was within its right to terminate the tenancy as stipulated in the contract. Plaintiff also claimed that when the said premises was handed back to the defendants it was in good tenantable condition. Plaintiff claimed that the delay in the handing back was due to the attitude of the defendants in not allowing the plaintiff's contractor to enter the said premises to do reinstatement and remedial works.

Whether the termination by the plaintiff at the end of the second tenancy agreement was lawful

It was not disputed that both parties negotiated for a long term lease to which they came to a mutual understanding that the lease should be at least for 12 years. It was also understood between the parties that the 12 years

should be divided into four three-year terms whereby the parties agreed that for each three-year term the parties had to execute a separate tenancy agreement. Each agreement had a separate rental rate with an option for the plaintiff to renew the tenancy for another three-year term at the rate as specified in the said tenancy agreement. Th rental rate in respect of the four terms is found in the letter dated 27 August 1985.

The parties executed the first tenancy agreement on 7 July 1986. As agreed the rental rate was fixed at RM4 per sq ft during the tenure of that tenancy agreement. Some of the relevant provisions in respect of this are in cl 6.01(j), (k) and (l):

> (j) The landlords shall upon the written request of the tenant made not less than six (6) months before the expiration of the said term grant to the Tenant a tenancy of the demised premises for a further term of three years ('the first term') at the rental and service charges of Ringgit Five Hundred and Three Thousand Four Hundred (RM503,400) only per annum and subject in all other respects to the same stipulations as are herein contained. The mode of payment of the rental and service charges for the first term shall be in accordance with ss 3.02 and 4.01 hereof respectively;
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> (k) The landlords shall upon the written request of the tenant made not less than six months before the expiration of the first term grant to the tenant a tenancy of the demised premises for a further term of three years ('the second term') at the rent and service charges of Ringgit Six Hundred and Twenty Nine Thousand Two Hundred and Fifty (RM629,250) only per annum and subject in all other respects to the same stipulations as are herein contained. The mode of payment of the rental and service charges for the second term shall be in accordance with ss 3.02 and 4.01 hereof respectively;
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> (l) The landlords shall upon the written request of the tenant made not less than six months before the expiration of the second term grant to the tenant a tenancy of the demised premises for a further term of three years at the rent and service charges to be agreed upon by the parties based on the prevailing market value, such market value to be determined by two independent chartered valuers appointed jointly by both parties, the decision of the chartered valuers being final and conclusive: PROVIDED ALWAYS that the cost and expenses incurred for the appointment of the chartered valuers shall be borne by both parties equally.

Despite the fact that the parties during the negotiations had agreed to the tenure and the rate, the parties found it fit to enter into a formal tenancy agreement for each separate three-year term. In my view, by the action of both parties in agreeing to enter into a formal tenancy for each three-year term, the parties had agreed to vary whatever had been agreed during the negotiations. Furthermore, as can be seen from the tenancy agreement, most of the terms and conditions agreed by the parties had been incorporated in the tenancy agreement. It is clear to me the binding contract would be the tenancy agreements executed by the parties and not what had been agreed during the negotiations and in the letters of offer and acceptance.

Before the expiry of the first tenancy agreement, the plaintiff gave the required notice to extend the lease for another three-year term. As a result

of that the second tenancy agreement was executed on 17 November 1989. The terms and conditions of the second tenancy agreement were exactly the same as the first tenancy agreement except for variations in respect of options to renew the tenancy for the remaining period.

Clause 6.01(j) and (k) of the second tenancy agreement are exactly the same as cl 6.01(k) and (1) in the first tenancy agreement which made it clear that in order to extend the lease for another three years the plaintiff must give written notice to extend six months before the expiry of that tenancy agreement. To my mind if the plaintiff fails to give the written notice then the defendants could let the said premises to someone else especially when the offer for the rental rate is better than the one given to the plaintiff. Conversely, if the plaintiff wishes to terminate, the plaintiff could just let the tenancy lapse or inform the defendants that it is terminating the tenancy. In the present case the plaintiff gave written notice to terminate the tenancy on 7 June 1991, about six months before the expiry of the second tenancy agreement. Plaintiff contended that the termination notice was given pursuant to cl 5.01(s) of the second tenancy agreement which provides as follows:

> ... at any time during the six calendar months immediately preceding the determination of the term hereby created to permit intending tenants and others with authority from the Landlords or their duly authorized agents at all reasonable times of the day to enter upon and view the demised premises; ... .

On 27 June 1991, the solicitors for the defendants wrote back stating that the notice given by the plaintiff was in breach of the representations made to the defendants during the negotiations and for that reason the notice to terminate was invalid, unlawful and of no effect. The plaintiff replied on 10 July 1991 stating the notice was given pursuant to cl 5.01(s) and it was within the plaintiff's right to terminate the tenancy. As a result of that, the solicitors for the defendants issued a without prejudice letter dated 29 August 1991 reiterating that the notice to terminate was unlawful, invalid and of no effect but at the same time requested for a joint inspection of the said premises to facilitate the reinstatement of the same to its original state.

Learned counsel for the defendants submitted that it was the intention of both parties as indicated during the negotiations and the letters of offer and acceptance that the plaintiff would be given a long lease of the said premises (not less than 12 years) with fixed rental rates. This was for the mutual benefits of both parties. For that reason the defendants were willing to accept a lower rental rate than the prevailing market rate. Defendants also adduced evidence of offers by third parties for rental rates higher than the one given to the plaintiff. Learned counsel submitted further that the termination notice was therefore unlawful, invalid and of no effect because it went against what had been agreed upon by the parties during the negotiations and the letters of offer and acceptance.

With the greatest respect to the learned counsel for the defendants, I am of the view that the parties are bound by the terms and conditions of the second tenancy agreement which the parties had executed. The

negotiations and the letters of offer and acceptance were subject to the execution of a formal tenancy agreement as agreed by the parties. In my opinion, if the defendants were mindful that the lease should be a continuous 12 years, they should insist on it to be written in the agreement, but then they had agreed to an escape clause in that the tenancy agreement by the term that the lease would be only for three years. They were bound by what have been stated in the second tenancy agreement. From the evidence, it is apparent to me that the defendants had ample opportunity to consult their solicitors before executing the second tenancy agreement and there was no excuse that the tenancy agreement was ineffective.

In the present case, the plaintiff on 7 June 1991 gave notice to the defendants that the plaintiff would not extend the tenancy on the expiry of the second tenancy agreement which was on 14 November 1991. In my opinion, the plaintiff was kind enough to let the defendants know six months in advance that the plaintiff would not extend the lease after 14 November 1991. This was to enable the defendants to look for new tenants.

Learned counsel for the defendants also submitted that the plaintiff was estopped from giving notice to terminate in view of the plaintiff's commitment to lease the said premises for 12 years. I could not see how the doctrine of estoppel is applicable in this case because the plaintiff had made it very clear from the very beginning that the lease was subjected to the execution of a formal tenancy agreement.

After viewing the evidence as a whole, I am of the view that the plaintiff was within its right under the terms of the second tenancy agreement not to renew the tenancy. The notice given by the plaintiff not to extend the tenancy was, therefore, lawful and valid.

The plaintiff, therefore, succeeds in its claim for the refund of the deposit.

Counterclaim by the defendant

In their counterclaims the defendants claim for the following:

(a) loss of rentals for six years;

(b) rental for the period from 14 October 1991 to 13 January 1992; and

(c) costs of reinstatement.

Loss of rentals for six years

It is clear to me that the claim by the defendants under this item depends on whether the termination notice dated 7 June 1991 was valid or not. I have found that the termination notice was valid and effective. In view of that, I am of the opinion that the defendants are not entitled to the claim under this item. The defendants' counterclaim under this item is hereby dismissed.

Rental for the period from 14 October 1991 to 13 January 1992 A

Plaintiff did not dispute the fact that it had to reinstate the said premises to the state when the plaintiff took possession of it on 14 October 1985, ie to its original state or as far as possible to its original state. Both parties carried out a joint inspection of the said premises on 17 September 1991 in order to determine the reinstatement works. From the evidence, it could safely be B concluded that the parties had identified the extent of the reinstatement works to be done when the solicitors for the defendants wrote to the solicitors for the plaintiff stating that the defendants' estimate for the reinstatement works was RM79,910. It was also indicated in that letter that the defendants were willing to accept that sum in lieu of the works to be carried out by the plaintiff so that the handing over of vacant possession C could take place on 1 November 1991.

The plaintiff rejected the offer on the ground that its estimate of the reinstatement works was lower than that given by the defendants. Plaintiff undertook to carry out the reinstatement works through its contractor. Apparently, the plaintiff was only concerned with the costs but did not take D into consideration the deadline given for the delivery of vacant possession which was to be on 1 November 1991. There was no request from the plaintiff to extend the deadline. It is obvious to me that the failure on the part of the plaintiff to deliver vacant possession on 1 November 1991 would render the plaintiff liable to pay rent for the period from the date when the second tenancy expired to the date of actual delivery of vacant E possession.

As it happened, the plaintiff failed to deliver vacant possession of the said premises on 1 November 1991. It was the contention of the defendants that the plaintiff failed to deliver vacant possession at all. From the evidence, the parties agreed to meet on 13 January 1992 to carry out the F inspection of the said premises before the said premises was handed back to the defendants. The parties did meet at the said premises on 13 January 1992 but apparently the plaintiff's representatives refused to participate in the inspection of the said premises. Instead, the plaintiff's representatives left the said premises after leaving the keys to the said premises at the said premises. The defendants' representatives carried out the inspection of the G said premises themselves whereby they had identified which reinstatement works were not completed or done and also the defects found on the completed works. The defendants then immediately informed the plaintiff of this. In my opinion, by their refusal to participate in the inspection, the plaintiff cannot deny the defects and those reinstatement works which were H not done or completed as pointed out by the defendants. Although formal delivery of vacant possession was not done, it is obvious to me that the said premises was handed back to the defendants on 13 January 1992 with all the defects and uncompleted works as pointed out by the defendants. The defendants had to carry out the remedial works and whatever cost of those remedial works was to be reimbursed by the plaintiff. I

As far as I am concerned, in respect of this item, the date of handing over was on 13 January 1992. With that, I find that the defendants are

A entitled to the rental in respect of the said premises from 14 October 1991 to 13 January 1992 as claimed by them under this item.

The plaintiff blamed the delay in delivering vacant possession on the defendants. It was submitted by the learned counsel for the plaintiff that the plaintiff had given ample notice to terminate the tenancy and the defendants should act promptly to carry out the joint inspection of the said premises. As it was the joint inspection was only carried out or 17 September 1991, which was less than one month before the tenancy was due to expire. It was further submitted that because of the delay, the reinstatement works could not be completed in time. With the greatest respect to the learned counsel, it is obvious to me that the defendants took up the position that the termination notice dated 7 June 1991 was invalid, unlawful and of no effect. They said so in their letter dated 29 August 1991. They took the view that there was no necessity for the joint inspection. Furthermore, the plaintiff had assured the defendants after the joint inspection on 17 September 1991 that the plaintiff would be able to deliver vacant possession on 1 November 1991. This was an indication from the plaintiff that it would be able to complete the reinstatement works by 1 November 1991. For the reasons I have stated, it is obvious to me that the blame on the defendants had not been substantiated.

Further, I am of the view that there was no necessity for a joint inspection to identify the reinstatement works at all. It was not disputed that under the agreement that on handing back the said premises the plaintiff was to ensure that the condition and the state of the said premises should be in its original state or as near as possible to its original state as at the time when the plaintiff took possession of it on 14 October 1985. It is clear from the evidence that a joint inspection was carried out on 4 November 1985 and the plaintiff should know what was the original state of the said premises. On the expiry of the tenancy, the plaintiff's duty was to reinstate the said premises to that state. I see no reason why a joint inspection was necessary. To me, it is sufficient for the plaintiff to carry out the reinstatement works and then request for a joint inspection at the handing over to show that the reinstatement works done were to the satisfaction of the defendants.

Another reason given by the plaintiff for the delay in delivering vacant possession was the difficulty in breaking down the reinforced wall. It is to be noted that it was the plaintiff who had built the reinforced wall for the purpose of its banking business. As such, the difficulty of breaking it down was within the knowledge of the plaintiff. Despite that the plaintiff found it fit to inform the defendants that the handing over would take place on 1 November 1991. It is obvious to me that when the plaintiff informed the defendants of the handing over date the plaintiff had taken into consideration the demolition of that wall. It is clear from the evidence, the estimate of the reinstatement works as to the costs and the time factor was done with the advice of the plaintiff's contractor. The plaintiff could not put the blame on others.

For the above reasons, I find that there was a delay on the part of the plaintiff in handing over the said premises for about three months, ie from

14 October 1991 to 13 January 1992. As such the defendants are entitled to the rental of three months. As stipulated in the second tenancy agreement, the rental for the period from 14 October 1991 to 13 October 1994 the annual rate would be RM629,250. The defendants are, therefore, entitled to the sum of RM157,312.50 being three months rent of the said premises.

Damages for remedial works

The defendants also claimed for damages in respect of remedial works carried out by them after the handing over. The remedial works were in respect of reinstatement works which were not completed and which were found to be defective. It is clear to me, as stated above, that on the date of handing over (13 January 1992) the defendants' representatives carried out the inspection of the said premises by themselves. The plaintiff's representatives refused to participate in the inspection. No reason was given why they refused to participate. By that inspection, the defendants' representatives had identified the defects and the uncompleted works. The defendants immediately notified the plaintiff in writing of those and in fact had itemized the defects and the uncompleted works. By the same letter the defendants informed the plaintiff that the cost of the remedial works was RM58,500, which is the amount the defendants are now claiming. From the evidence, the plaintiff did nothing to dispute what had been stated by the defendants in that letter. It is too late for the plaintiff to deny it now. Further, I am of the view that by the refusal of the plaintiff's representatives to participate in the inspection done on 13 January 1992, the plaintiff cannot deny the defects and uncompleted works as found by the defendants' representatives during that inspection.

The plaintiff gave evidence to show that the replacement materials used such as glasses, marble slabs for the floor and others were of superior quality as compared to the originals but no reason was given for such assertions. On the other hand, the plaintiff admitted that it could not get the original materials in the local market. To get them, the materials had to be imported resulting in unnecessary high expenditure.

I am of the view that the issue of whether the replacement materials used were of inferior or superior quality is not important. What is important here is whether the materials used were the same or very similar to the originals. The defendants had produced photographs to show that the materials used by the plaintiff were not the same or similar to the original materials. After perusing the photographs, I have no hesitation in agreeing with the defendants that the replacement materials were not the same or similar to the originals. The defendants also gave evidence that the original materials were available at some local hardware shops.

For the above reasons, I find that there was no excuse for the plaintiff not being able to obtain the original materials or something similar to the originals. I would, therefore, allow the sum of RM58,500 claimed by the defendants for the remedial works.

Others

There is one more item which, in my opinion, the defendants are entitled to claim. It was not specifically claimed by the defendants in their counterclaim. This claim is connected to the remedial works carried out by the defendants. It is obvious to me that the defendants would not be able to lease the said premises while the remedial works were being carried out. It is also obvious to me that despite the notice given by the defendants to the plaintiff of the defects and uncompleted works, the plaintiff was not willing to carry out the remedial works. For the above reasons, it is only reasonable to give the defendants one month period to complete the remedial works. The one month period was to commence from 13 January 1992. As such the defendants would lose the rental of one month from 13 January 1992 and they should be compensated for that. I would, therefore, allow the sum of RM52,437.50 (being one month rent) as compensation to the defendants.

Before concluding, I would like to observe that the plaintiff was to be blamed for the dilemma the plaintiff is facing now. It is clear to me that if the plaintiff was to accept the defendants' offer of RM79,910 as the full cost of reinstatement works, the handing over would take place on the expiry of the tenancy agreement. For that reason, there was no necessity for the plaintiff to pay the rental for the spilt over period and the cost for the remedial works.

Conclusion

The plaintiff's claim for the refund of the deposit of RM251,700 is hereby allowed.

The defendants' counterclaim in respect of the following:

(a)	Rental for 3 months from 14 October 1991 to 13 January 1992	–	RM157,312.50
(b)	Costs of remedial works	–	RM 58,500.00
(c)	Rental for 1 month		
	from 13 January 92	–	RM 52,437.50
	Total	–	RM268,250.00

is hereby allowed.

Both parties, during submission, came to an agreement in respect of interest which are as follows:

(1) Claim by the plaintiff on the deposit —

(a) 4%pa from 14 January 1992 to date of judgment; and

(b) 8%pa from date of judgment until full realisation.

(2) Counterclaim by the defendants — A

(a) 4%pa for the three months rental from 14 October 1991 until date of judgment;

(b) 4%pa for the cost of remedial works from 14 February 1992 until date of judgment;

(c) 4%pa for one month rental from 14 February 1992 until judgment date; and B

(d) 8%pa for whatever balance which had not been paid after judgment until date of realisation.

I leave it to the parties to do the necessary set off. As to the costs, as I have stated earlier, the plaintiff succeeded in their claim and the defendants succeeded in their counterclaim. I will make no order as to costs. C

Order accordingly.

Reported by Jafisah Jaafar

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